TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 117.

FRANK D. THOMPSON, TRUSTEE IN BANKRUPTCY OF HERBERT E. MOORE, BANKRUPT, PLAINTIFF IN ERROR,

vs.

HENRY FAIRBANKS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

FILED SEPTEMBER 21, 1904.

(19,070.)

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INDEX.

	Original.	Print.
ption	1	1
intiff's writ and declaration	2	1
dgment sustaining defendant's demurrer to plaintiff's second ount in declaration	4	3
intiff's specifications	5	3
fendant's plea and notice	5	4
der of reference	9	6
feree's report	10	7
fendant's exceptions to referee's report	18	12
dgment on referee's report	18	12
owance of plaintiff's exceptions to judgment	18	12
er staying judgment and passing cause to supreme court	18	12
gment of supreme court	19	12
ntiff's bill of exceptions	20	13
ntiff's Exhibit 1, G. M. P.—Writ and declaration, suit of John Ryan *vs.* Herbert E. Moore	21	13
Officer's return of service of same	23	15

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	Original.	Print
Plaintiff's Exhibit 2, G. M. P.—Mortgage of April 15, 1891, Herbert E. Moore to Henry Fairbanks...	25	16
Return of sheriff's sale of mortgage property.....	27	18
Plaintiff's Exhibit 3, G. M. P.—Mortgage of March 5, 1900, Herbert E. Moore to Henry Fairbanks...	31	20
Assignment of mortgage of March 5, 1900, Henry Fairbanks to the Passumpsic savings bank	33	22
Petition in district court of United States to have Ryan attachment preserved.	35	23
Agreements of facts in same case	38	25
Opinion of Wheeler, judge, in same case	40	27
Clerk's certificate	44	29
Opinion of Vermont supreme court.....	45	30
Assignment of errors	57	37
Prayer for reversal	61	39
Clerk's certificate.....	61	40
Petition for writ of error.....	62	40
Bond on writ of error	64	41
Clerk's certificate.....	65	42
Writ of error	66	42
Clerk's certificate.....	68	43
Citation and service	69	44
Return to writ of error	70	45
Statement of costs	70	45

1 Supreme Court of Vermont, Caledonia County.

Pleas of the honorable supreme court of the State of Vermont for the county of Caledonia, begun and held at Montpelier, in the county of Washington, on the second Tuesday of May, A. D. 1903, being the 12th day of said month, and being a general term of said court.

Present: Hon. John W. Rowell, chief judge, Hon. James M. Tyler, Hon. Loveland Munson, Hon. Henry R. Start, Hon. John H. Watson, Hon. Wendell P. Stafford, Hon. Seneca Haselton, associate judges.

On which day the court was opened and continued its session from day to day, for the disposition of causes, until the 30th day of July, A. D. 1903, when the same was adjourned without day.

FRANK D. THOMPSON, Trustee,
vs.
HENRY FAIRBANKS. } No. 1358.

Be it remembered that at the May term, A. D. 1903 of the supreme court of the State of Vermont, begun and held at Montpelier, in the county of Washington, comes Frank D. Thompson, trustee in bankruptcy of the estate of Herbert E. Moore, bankrupt, by due appointment and qualification in the United States district court for the district of Vermont, by Porter & Thompson his attorneys and brings before said court for revision a certain judgment upon an issue impleaded before the honorable county court within and for the county of Caledonia, with his bill of exceptions thereto, as in said county court duly allowed, at the December term thereof, A. D. 1902, which issue, judgment and proceedings are in the words following, that is to say:

Be it remembered, that in a term of the county court, begun and held at St. Johnsbury, in the county of Caledonia and State of
2 Vermont, on the first Tuesday of June, A. D. 1901, comes Frank D. Thompson, who is trustee in bankruptcy of the estate of Herbert E. Moore, bankrupt, by due appointment and qualification in the United States district court for the district of Vermont, who brings this suit as such trustee, of St. Johnsbury in the county of Caledonia, by Porter & Thompson, his attorneys and brings into the court now here his certain writ and declaration against Henry Fairbanks, of St. Johnsbury, in the county of Caledonia, wherein the said defendant is summoned and attached to answer to the plaintiff in a plea of the case, for that the defendant, heretofore, to wit: on the 1st day of April, A. D. 1901, at St. Johnsbury in the county of Caledonia was indebted to the plaintiff in the sum of fifteen hundred dollars, for work and labor, care and diligence of

the plaintiff done performed and bestowed, and for materials for the same, provided before that time, in and about the business of and for the defendant by the plaintiff and at the defendant's like special instance and request; and, also, in the like further sum of money, for divers goods, wares and merchandise, before that time sold and delivered to the defendant by the plaintiff, and at the defendant's like special instance and request; and also, in the like further sum of money for money before that time lent and advanced to the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for other money, before that time paid, laid out and expended for the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for other money by the defendant before that time had and received for the use of the plaintiff; and, also, in the like further sum of money, for interest, for the plaintiff's forbearance at the said defendant's request, of moneys due and owing from said defendant to plaintiff; and,
3 also, in the like further sum of money, found to be due from the defendant to the plaintiff upon an account before that time stated between them; and, in consideration thereof, then and there undertook and faithfully promised to plaintiff to pay the plaintiff the said several sums of money in the count mentioned, when thereunto afterwards requested. Yet though often requested the defendant has never paid the same, but wholly neglects and refuses so to do.

And in a further plea of the case for that whereas, on the 30th day of June A. D. 1900, Herbert E. Moore of St. Johnsbury, in the county of Caledonia, aforesaid, filed his voluntary petition in bankruptcy in the United States district court for the district of Vermont, and on the 3d. day of July, A. D. 1900, in and by said court was duly adjudged a bankrupt, and thereafter on the 15th day of September, A. D. 1900, the plaintiff was in and by said court appointed and qualified as trustee in bankruptcy of said Herbert E. Moore's estate, and that on the 16th day of May, A. D. 1900, and within four months before the filing of the petition in said bankruptcy proceedings the said Herbert E. Moore was insolvent, and was then and there owing the said defendant a large sum of money, to wit, three hundred dollars, and the said defendant was then and there surety upon two promissory notes to the amount, to wit, three thousand dollars, signed by the said Moore as principal, and the said Moore then and there, with a view to give preference to said defendant did transfer and deliver to said defendant a great quantity of goods and chattels, to wit, eight horses, seven buggies, two phætons, three surries, one express wagon, one lumber wagon, seven sleighs, two sets double driving harnesses, nine single harnesses, four street blankets, seven black Jap robes, six heavy fall lap robes, twenty summer robes, ten carriage mats and six whips, all of the value of fifteen hundred dollars. And the plaintiff avers that the said defendant

at the time of said transfer and delivery to said defendant,
4 had reasonable cause to believe that said transfer and delivery to the defendant was intended to give a preference to said defendant over the other creditors of the said Moore and were in fraud of the laws relating to bankruptcy.

And the plaintiff avers that thereafterwards, to wit, on the first day of June, A. D. 1900, at St. Johnsbury aforesaid, the defendant transferred, sold and converted to his own use said goods and chattels and has not since had possession or control thereof. Whereby and by virtue of the statute in such cases made and provided an action hath accrued to the plaintiff as trustee to have and recover of the defendant the value of said goods and chattels, to wit, fifteen hundred dollars.

Yet the defendant, though often requested hath never paid said sum nor any part thereof, but detains it and wholly neglects and refuses to pay said sum.

To the damage of the plaintiff two thousand dollars, for the recovery of which, with just costs, the plaintiff brings suit.

As by said writ and declaration, referred to, on file appears.

And at the said June term, A. D. 1901, of said Caledonia county court, comes the said Henry Fairbanks, defendant, by Harry Blodgett, his attorney, and files a demurrer to the said declaration of the said plaintiff, which said demurrer filed in court on the 18th day of May, A. D. 1901 and now on file and referred to will more fully and at large appear.

And, upon hearing, it is adjudged, by the court, that the demurrer as to said second count be sustained and said second count adjudged insufficient.

And the said cause is ordered, by the court, to be continued to the December term, A. D. 1901, of said Caledonia county court.

And the plaintiff comes by his attorneys aforesaid and files specifications in the words and figures following:

5 *Plaintiff's Specifications.*

Henry Fairbanks debtor to Frank D. Thompson, trustee in bankruptcy of the estate of Herbert E. Moore, bankrupt, for cash received on June 11, A. D. 1900, from the sale of the following described property belonging to the said estate, viz., one chestnut horse called Tom, one gray mare called Mollie, one pair of chestnut mares called the Bailey & Jewett mares, one pair of bay mares called the Packard mares, one mare called Mattie, one mare called Mertie, one piano box buggy, one top buggy, Boston B. make, 3 corning top buggies, Boston B. make, one phaeton, with rubber tires, one two seat canopy top surr-y, with rubber tires, one two seated surr-y with steel tires, one two seated surr-y, one top buggy with rubber tires, one Concord buggy, one express wagon, one lumber wagon, one two seated sleigh, one top sleigh, four single sleighs, two set double driving harnesses,

nine single harnesses, four street blankets, seven black Jap robes, two gray robes, six heavy fall lap robes, twenty summer robes, ten carriage mats, six whips, $922.08.

FRANK D. THOMPSON, *Trustee.*

And the defendant also comes by Harry Blodgett, his attorney, aforesaid, and files his pleas in the words and figures following, viz.:— And now the said defendant comes and defends the wrong and injury when, &c., and says that he did not assume and promise, in manner and form, as the plaintiff in his declaration has alleged, and thereof puts himself on the country.

By his attorney, HARRY BLODGETT.

And the said defendant gives notice according to the form of the statute in such case made and provided, that upon the trial of said cause, he will give in evidence and rely upon in defence of said action, the following special matters: to wit: That said Herbert E. Moore in said writ mentioned, and upon whose estate said
6 plaintiff claims to be the trustee in bankruptcy on the 15th day of April, A. D. 1891, duly made, executed and delivered to the said defendant a chattel mortgage in writing and bearing the date aforesaid, whereby the said Moore sold and conveyed to the said defendant, "All my (his) livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I (said Moore) may purchase in my (his) business, or acquire by exchange." Which said chattel was upon condition that "If I (the said Moore) well and truly pay or cause to be paid to the said Henry Fairbanks all that I (said Moore) now owe him or may owe him hereafter by note, book account, or in any other manner, and shall well and truly save said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my (said Moore's) benefit as surety, indorser, or otherwise, then this deed shall be void otherwise of force." And the said Herbert E. Moore and said Henry Fairbanks made an affidavit which was and is a part of said chattel mortgage in the words and figures following: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the condition thereof and the contemplated loan and liability and for no other purpose whatever, and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the honest purpose of enabling the grantor to raise money for use in his livery business." Which said affidavit was subscribed by said Moore and Fairbanks and each made oath to the truth of the same on the 17th day of April, A. D. 1891, before Alexander Dunnett, master in chancery.

That said chattel mortgage was thereafterwards on the 18th day of April, A. D. 1891, duly recorded in the town clerk's office of the

town of St. Johnsbury, where the said Herbert E. Moore then
7 and ever since has resided, and where said property was then situate, and which said chattel mortgage was on the 16th day of May, A. D. 1900, in full force and effect and had not been paid, cancelled, or discharged.

That said Herbert E. Moore was on said last named day at St. Johnsbury aforesaid, indebted to said defendant in the sum of, to wit: four hundred seventy-six and 63/100 dollars, and the said defendant had endorsed for said Moore and obligated himself to pay for said Moore a large sum of money, to wit: three thousand dollars, and said defendant on the 22nd day of May, A. D. 1900, did pay for said Moore a part of said obligation: to wit: five hundred twenty-six and 27/100 dollars to the First National Bank of St. Johnsbury, Vermont, for all which said indebtedness and obligations the said defendant was secured by said chattel mortgage.

That a part of which indebtedness, as aforesaid, had been long overdue on said 16th day of May, A. D. 1900, to wit: for the space of six months.

That the said defendant on the 16th day of May, A. D. 1900, at St. Johnsbury in the county of Caledonia, placed his said chattel mortgage in the hands of Lorenzo Sulloway, sheriff of Caledonia county, for the purpose of foreclosing the same, said Sulloway was then, and ever since has been, sheriff of Caledonia county, and the said Moore then and there consented that said Sulloway might take possession of said livery property for this defendant.

That said Moore then and there pointed out to said Sulloway the property covered by said mortgage, which is the same property named by the plaintiff in his specifications, and all said property named in said specification was on said 16th day of May, A. D. 1900, in the possession of said Moore, and a part of his livery property at St. Johnsbury aforesaid, and were the horses, and livery prop-
8 erty, described in said chattel mortgage, or that had been purchased by said Moore, or acquired by him in exchange, subsequent to the date of said chattel mortgage.

That said Moore then and there put said Sulloway in possession of all of said property named in the plaintiff's specification, and for which the plaintiff seeks to recover in this suit, and which was covered by said chattel mortgage to the defendant: that said Sulloway remained in and held possession of all of said described property named in plaintiff's specification, under and by virtue of said chattel mortgage, and with the consent of said Moore, until the 11th day of June, A. D. 1900, when he sold the same at public auction with the consent of said Moore, at the livery stable of said Moore in St. Johnsbury in the county of Caledonia, said livery stable then and there being a public place in said town of St. Johnsbury. Said Sulloway having first on the 16th day of May, A. D. 1900, advertised said property for sale at public auction by posting a notification in two public places in said town of St. Johnsbury that the said named property, describing it, would be sold by him at pubic auction on

the 4th day of June, A. D. 1900, at ten o'clock in the forenoon, to satisfy said mortgage with legal costs, at the livery stable of H. E. Moore, on Main street, in the village and town of St. Johnsbury, at which time said Sulloway attended and adjourned said sale, to the 11th day of said June, at the same place and the same time in the day, by posting notifications as before set forth, at which last named time and place, said Sulloway attended and sold all of said property named in plaintiff's specification, as advertised at public auction upon said chattel mortgage, and applied the proceeds of said sale upon the said defendant's said mortgage indebtedness.

That all the said property named in the plaintiff's said specification, and for which he seeks to recover in this action: to wit:
9 "one chestnut horse called Tom, one gray mare called Mollie, one pair of chestnut mares called the Bailey & Jewett mares, one pair of bay mares called the Packard mares, one mare called Mattie, one mare called Mertie, one piano box buggy, one top buggy Boston B. make, 3 Corning top buggies Boston B. make, one phaeton with rubber tires, one old phaeton, one two seated canopy top surrey with rubber tires, one two seated surrey with steel tires, one two seated surrey, one top buggy with rubber tires, one Concord buggy, one express wagon, one lumber wagon, one two seated sleigh, one three seated sleigh, one top sleigh, four single sleighs, two sets double driving harnesses, nine single harnesses, four street blankets, seven black Jap robes, two grey robes, six heavy fall lap robes, twenty summer robes, ten carriage mats, six whips, $922.08," was and is the same identical property sold and conveyed in mortgage by said Moore to the defendant on said 15th day of April, A. D. 1891, and which was taken possession of by said Sulloway with the consent of the said Moore, for the defendant, under said mortgage, and was sold upon the mortgage, on the 11th day of June, A. D. 1900, with the consent of said Moore by said Sulloway, at public auction as herein before set forth as he had a legal right to do.

That said defendant causing the said named property to be sold upon his said mortgage with the consent of said Moore, as he had a legal right to do, as aforesaid, is all of the said several supposed promises and undertakings in the said plaintiff's declaration mentioned, whereby he has declared against the defendant and for which he seeks to recover in said suit.

By his attorney, HARRY BLODGETT.

And now at the December term, A. D. 1901, of said Caledonia county court, come the parties aforesaid by their respective attorneys aforesaid, and it is ordered by the court, by the consent of the parties, that the cause be referred to the determination of George M. Powers, Esq. who shall hear said cause and report to this
10 court. And day thereof is given &c.

And now at a term of the said Caledonia county court begun and held at St. Johnsbury, within and for the county of Caledonia, on the first Tuesday of December, A. D. 1902, come the par-

ties aforesaid by their respective attorneys aforesaid; and the said referee files in said court his report in the words and figures following, viz.:

Caledonia County Court, December Term, 1902.

FRANK D. THOMPSON, Trustee,
vs.
HENRY FAIRBANKS.

Porter & Thompson, attorneys for the plaintiff.
Harry Blodgett and Jonathan Ross, attorneys for the defendant.

To the hon. county court within and for the county of Caledonia:

The undersigned referee in the above entitled cause, respectfully reports that he met the parties and their counsel at the office of Porter & Thompson in St. Johnsbury on the 18th day of November, 1902, and first having been duly sworn, heard their evidence, and subsequently received and considered their respective requests for findings, and thereupon finds and reports the following facts:

The action is general and special assumpsit, but the plaintiff relies only upon the general counts. The plea is the general issue, with notice of special matter justifying under a sale under a chattel mortgage dated April 15, 1891.

At some time prior to the transactions hereinafter set forth, one Herbert Moore bought out a livery stock and business run by one Nettleton and wife in buildings owned by the defendant in St. Johnsbury village. Moore paid $2.750 therefor, about $800 in cash and the balance by assuming a mortgage then on the property held by one Maria Hill. Moore occupied the premises under the
11 Nettleton lease until its expiration, and then continued under a verbal lease at an increased rent until the sale of his livery property as hereinafter set forth.

Shortly before March 1st, 1888, Maria Hill died, and the defendant assisted Moore to pay off the claim held by her estate against the livery property, by signing a note with Moore for $1,425 dated March 1, 1888, on demand, and payable to the Passumpsic Savings Bank of St. Johnsbury. Moore gave the defendant a mortgage to secure this note, but it did not appear before me what it covered, and it cuts no figure in the determination of the issues in this case.

The defendant also signed a note with Moore for $350 dated July 15, 1890, and another for $500 dated May 5, 1891, both payable to said savings bank on demand. These three notes, with accrued interest, were merged in one dated March 1, 1900, for $2,510.75, due on demand, to said savings bank, signed by Moore, and by the defendant as surety. This note had not been paid when this case was heard before me.

The defendant also signed notes with Moore payable to the First National Bank of St. Johnsbury, as follows:

One dated June 22, 1886, for $750, which by payments made by Moore and sucessive renewals became one dated June 23, 1892, for $125; one dated May 21, 1889, which on Nov. 21, 1892, was reduced by Moore to $150; one dated Sept. 28, 1892, for $325.

These last three notes were merged in a note under date of Nov. 21, 1892, for $575 which was carried by the bank until May 21, 1898, when it was reduced by Moore to $525; and on June 4, 1900, it was paid by the defendant. These notes were all signed by the defendant to assist Moore in carrying on, building up and equipping his livery stable and livery business, and as between them belonged to Moore to pay.

12 On April 15, 1891, Moore gave the defendant a chattel mortgage on the livery property to secure him for these and other debts and liabilities; a certified copy of this mortgage, together with officer's return thereon (hereinafter referred to), marked "Pl'ff's Ex. 2, G. M. P." was received in evidence, without objection, and is attached hereto and made a part thereof.

On March 5, 1900, Moore gave the defendant another chattel mortgage on this livery stock, which on March 23, 1900, was assigned to said Passumpsic savings bank, which bank has ever since been the holder and owner thereof. A certified copy of this mortgage and assignment, marked "Pl'ff's Ex. 3, G. M. P." was received in evidence, without objection, and is attached hereto and made a part hereof.

On May 7, 1900, one John Ryan sued out a writ against Moore declaring therein in general assumpsit for $500 damages, and attached by one Worthen, deputy sheriff, this livery stock. This writ, with the officer's return thereon, marked "Pl'ff's Ex. 1, G. M. P." was received in evidence, without objection, and is attached hereto and made a part hereof. This attachment remained in force until dissolved by the bankruptcy proceedings hereinafter referred to, and the suit is still pending in this court.

At the time the chattel mortgage of April 15, 1891, was given by Moore to the defendant, it was agreed and understood by the parties to it, that Moore should sell or exchange any of the livery stock covered by it as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired, and that all after-acquired livery property should be covered by the said mortgage as security for the debts specified therein. Pursuant to such understanding and agreement, Moore made sales, purchases and exchanges of livery stock to such an extent that on March 5, 1900, and May 16, 1900, there only remained of the livery property on hand April 15, 1891, two horses,

13 called Tom and Mattie, respectively. These sales, exchanges and purchases were made by Moore, sometimes without communication with or advice from the defendant, and frequently after consultation with him. The livery stock as it existed on May 16, 1900, was all acquired by exchange of the original stock or with the avails of the old stock sold or the money derived from the business;

there was more of it at this time that when bought by Moore, and its value had materially increased, but beyond the prices for which it sold as hereinafter set forth, there was no evidence before me on which I am able to find its fair cash value.

Some years after the mortgage of April 15, 1891, was given, Moore became embarrassed, and finally and shortly prior to March 5, 1900, he became and continued wholly insolvent.

On May 16, 1900, the defendant acting under the advice of his attorney Hon. W. P. Stafford, and with the consent of Moore, took possession under the mortgage of April 15, 1891, of all the livery property then on hand, and on June 11, 1900, caused the same to be sold at public auction by Lorenzo Sulloway, sheriff, as shown by the return on the mortgage hereto attached.

On June 30, 1900, Moore filed his voluntary petition in bankruptcy, and on July 3, 1900, was duly adjudged a bankrupt. The plaintiff was appointed trustee in bankruptcy of his estate Sept. 15, 1900, and duly accepted and qualified, and is acting as such.

It is for the net avails of the sale of June 11, 1900, as appears by the plaintiff's specification (including the amount received for the horses "Tom" and "Mattie," $42.50 and $26 respectively) amounting to $922.08 which the officer, Sulloway, paid over to the defendant as shown by said officer's return, that this suit is brought.

It is admitted that the plaintiff made a proper demand upon the defendant for this money before this suit was brought, and
14 that the defendant refused to pay it over and has ever since refused to do so; but the exact date of such demand and refusal did not appear. No question is made as to the regularity of the officer's proceedings in making this sale as shown by his return.

The Passumpsic savings bank, on Sept. 15, 1900, proved its said not- of $2,510.75 (which is specified in the condition of the mortgage of March 5, 1900, as one of the debts secured thereby) as an unsecured claim against the bankrupt estate of said Moore.

For the purpose of defeating the effect of the defendant's taking possession of the livery property under his chattel mortgage as aforesaid, this plaintiff brought petition to the United States district court, Wheeler, J., for leave to enter as plaintiff in the Ryan suit and to have the lien of Ryan's attachment preserved for the benefit of the general creditors; this petition was dismissed by that court. I find the facts covered by this paragraph upon the evidence of a certified copy of the record of that petition and the proceedings under it, which was admitted in evidence subject to the plaintiff's objection and exception; which certified copy is hereto attached and made a part hereof. The defendant had never taken possession of this livery property prior to May 16, 1900, and at this time there were horses, harnesses and vehicles of other parties in the stable, mixed with Moore's property so that it would not be possible from the mortgage unaided by Moore, or some person having knowledge, to pick out the mortgaged property; but with such aid the officer had no difficulty in selecting the mortgaged property. Some little

time before the defendant took possession of the livery property under his mortgage as aforesaid, and about the time the mortgage of March 5, 1900, was given, Hon. Alexander Dunnett, counsel for Moore, talked with the defendant about Moore's solvency. Mr. Dunnett was anxious lest the defendant should interfere with the
15 continuance of Moore's business if the mortgage of March 5, 1900, was allowed to stand, and told the defendant how Moore's financial affairs then stood, that he owed about $4,000 and had assets of about $2,000, and referred to Moore's going through bankruptcy. Mr. Dunnett also talked with Mr. Stafford, with whom all the legal questions involved in these matters had been intrusted by the defendant, in regard to the defendant's security, and the possibility of Moore's going into bankruptcy.

From the defendant's general acquaintance with Moore's affairs and of the undischarged attachment in the Ryan suit and the conversations with Mr. Dunnett, I find that the defendant and his counsel knew when he took possession of the livery property under his mortgage as aforesaid, that Moore was insolvent and was considering going into bankruptcy. I make this finding as to Mr. Stafford's knowledge of Moore's financial condition on the evidence of Mr. Dunnett as to conversations which he had with Stafford, which was received subject to the defendant's objection and exception.

When the defendant took possession of the livery property under his mortgage as herein set forth, he did not intend to perpetrate any actual fraud on the other creditors or any of them, but he did intend thereby to perfect his lien on the livery property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. And he understood at that time that it was probable that the Ryan attachment would hold good against his mortgages. All the property of which he took possession, was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage of April 15, 1891. In reaching this conclusion I consider the
16 testimony of Moore to that effect, which was received under the plaintiff's objection and exception.

Dunnett and Moore consented that the defendant might take possession of the property as above set forth, but the arrangement in reference thereto was made between Dunnett and Stafford, attorneys as aforesaid. By this arrangement the property was to be sold and the avails held by the officer in place of the property for whoever turned out to be entitled thereto, and neither Moore nor his counsel consented that the avails of the sale might be applied on the defendant's debts. Mr. Stafford asked Harland B. Howe, attorney for Ryan in the attachment, to consent to this arrangement, but he refused, claiming the attachment to be good against the mortgages.

At the time the defendant took possession of the livery property (May 16, 1900) he furnished the officer, Sulloway, a statement of his

account against Moore as he then claimed it to be; this statement is shown in the officer's return hereto attached, and exclusive of the $525 note above referred to, which was not due or paid until after the defendant so took possession, shows a balance then due the defendant of $435.95. The debtor side of this account contained, in addition to the charge for the stipulated rent of $15 per month, two charges amounting to $76.98 for extra horses kept by Moore on the rented premises. The defendant claims that Moore agreed to pay fifty cents per month for each horse kept in the stable above the stipulated number; Moore denies this. From all the evidence before me, I am unable to find this agreement to pay the extra price made out by a fair balance of evidence and therefore find that these charges are not legitimate. On the credit side of this statement, the defendant allowed a payment of $40 and interest thereon. I find that on July 21, 1890, Moore paid the defendant $60 and took from him a receipt of which the following is a copy:

17 ST. JOHNSBURY, VT., *July* 21, 1890.

Received of Herbert Moore sixty dollars on account of advance rent of stable to be accounted for with interest in final settlement.

(Signed) HENRY FAIRBANKS.

$60.

This $60 has never been accounted for by the defendant and amounted on May 16, 1900, with simple interest to $95.44.

December 6, 1898, Moore paid the defendant a check of $30 on account of his rent of the barn and this has not been accounted for; and with interest, amounted on May 16, 1900, to $32.60.

Disallowing the above charges of extra rent, readjusting interest on the debtor side accordingly, and allowing Moore these two items of credit, with interest, the open account between Moore and the defendant stood on May 16, 1900, with a balance of $269.19 due the defendant.

The amount paid by the defendant June 4, 1900, on the $525 note was $526.27; and the note for $2,510.75 with interest thereon was outstanding.

The question of what judgment should be rendered herein, and all questions of law involved, are respectively referred to the court.

I find also that the defendant was at the livery stable from 1891 to the time he took possession, frequently and generally as often as once in two or three weeks, and observed and knew of the changes that were being made in the property and that it was being kept up by Moore as he has agreed with the defendant.

Respectfully submitted.

GEO. M. POWERS, *Referee.*

18 And the defendant comes by his attorneys aforesaid and files exceptions to the said report in the words and figures following, viz.:

Defendant's Exceptions to Referee's Report.

And now comes the defendant and excepts to the referee's report in said cause, for the reason that the referee received in evidence and considered the testimony of Alexander Dunnett against defendant's objection and exception as to conversations that he had with Mr. Stafford as to Moore's financial condition at about the time the defendant took possession of the livery property, and upon which evidence the referee bases his finding "that the defendant and his counsel knew when he took possession of the livery property under his mortgage as aforesaid, that Moore was insolvent and was considering going into bankruptcy."

By his attorneys, HARRY BLODGETT AND
JONATHAN ROSS.

And at the same term of the said court the court renders judgment in the words following: "Judgment, *pro forma*, and without hearing, sustaining the defendant's exceptions to the report of the referee, and for the defendant to recover his costs. Exceptions by the plaintiff."

And plaintiff having prayed that he may be allowed exceptions to the judgment and decision of the court in this cause, and said exceptions, having been duly assigned and allowed, it was thereupon ordered by the court that execution of its judgment in this cause be stayed, and that said judgment be passed for revision and final determination to the honorable supreme court then next to be held at Montpelier, in the county of Washington, on the second Tuesday of May, A. D. 1903.

19 And at the term of the supreme court aforesaid, to wit, on the day and year last aforesaid, said cause is duly entered in this court, and the parties come by their respective attorneys to be heard upon the exceptions of the plaintiff as in his bill, now here remaining on file, fully and at large doth appear.

Whereupon the parties having been fully heard as well the plaintiff as the defendant upon said judgment and exceptions, and mature deliberation being thereupon had,

It is considered and adjudged by the court here, that in the judgment of and decision of the honorable county court in this cause there was not error, and that said judgment be in all things affirmed and stand in full force and effect.

And it is thereupon adjudged by the court that the said defendant have and recover of the said plaintiff his costs here taxed and allowed at the sum of nineteen and 33/100 dollars, for which said sum the said defendant may have execution against the said plaintiff.

Execution issued this — day of —— A. D. 19—, returnable in sixty days.

A true record.

Attest: ALBRO F. NICOLS, *Clerk.*

20 FRANK D. THOMPSON, Trustee, *vs.* HENRY FAIRBANKS. } Pending in Caledonia County Court.

Plaintiff's Exceptions.

In the above entitled cause the writ, defendant's plea and notice, plaintiff's specifications, report of referee, defendant's exceptions thereto and all of the exhibits are referred to and made a part hereof. Judgment *pro forma*, and without hearing, sustaining the exceptions to the report, and for the defendant to recover his costs. To all of which the plaintiff excepted.

Exceptions allowed, execution stayed and cause passed to the supreme court.

JOHN H. WATSON,
Presiding Judge.

(Indorsed:) Frank D. Thompson, trs., *vs.* Henry Fairbanks. Caledonia county court. Plaintiff's exceptions. Filed March 25, 1903. George L. Hunt, deputy clerk.

21 *Exhibits Referred to in and Made a Part of the Referee's Report and Plaintiff's Exceptions.*

PL'FF'S EX. 1, G. M. P.

STATE OF VERMONT, *Caledonia County,* } ss:

To any sheriff or constable in the State, Greeting:

By the authority of the State of Vermont, you are hereby commanded to attach the goods, chattels, or estate of Herbert E. Moore of St. Johnsbury in the county of Caledonia to the value of six hundred dollars, and notify him thereof according to law; and also notify him to appear before the county court at St. Johnsbury, within and for the county of Caledonia, and also to notify him to cause his appearance herein, to be entered with the clerk of said court, on or before the expiration of forty-two days from the date hereof, then and there in said court to answer to John H. Ryan of St. Johnsbury in the county of Caledonia, in a plea of the case, for that the defendant heretofore, to wit: on the 5th day of May, A. D.

1900, at St. Johnsbury in the county of Caledonia was indebted to the plaintiff in the sum of five hundred dollars, for work and labor, care and diligence of the plaintiff done, performed and bestowed, and for materials for the same, provided before that time, in and about the business of and for the defendant by the plaintiff and at the defendant's special instance and request and, also, in the like further sum of money, for divers goods, wares, merchandise and chattels before that time sold and delivered to the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for money before that time, lent and advanced to the defendant by the plaintiff, and at the defendant's like special instance and request; and, also,
22 in the like further sum of money, for other money, before that time paid, laid out and expended for the defendant by the plaintiff, and at the defendant's like special instance and request; and, also, in the like further sum of money, for other money by the defendant before that time had and received for the use of the plaintiff; and, also, in the like further sum of money, found to be due from the defendant to the plaintiff, upon an account due before that time stated between them; and, also, in the like further sum of money due from the defendant to the plaintiff for the use and occupation of a certain messuage, tenement and premises, buildings, farm and lands, with the appurtenances, of the said plaintiff by the said defendant at his special instance and request, and by the sufferance and permission of the said plaintiff for a long time before then elapsed, had, held, used, occupied, possessed, and enjoyed; and in consideration thereof, then and there undertook and faithfully promised the plaintiff to pay the plaintiff the several sums of money in the count mentioned, when thereunto afterwards requested. Yet though often requested, the defendant has never paid the same, but wholly neglects and refuses so to do.

To the damage of the plaintiff five hundred dollars, for the recovery of which, with just costs, the plaintiff brings suit.

And you are further commanded to summon Dr. J. E. Hartshorn and Fred S. Harriman of St. Johnsbury in the county of Caledonia, trustee of the said defendant, to appear before said court at the time and place aforesaid, and make disclosure, according to law, of the goods, chattels, rights or credits of the said defendant which the said trustee may have in his or their or either of their hands or possession, and also notify them to cause their appearance herein to be entered as the law requires.

Fail not, but service and return make within 21 days from the date hereof.

23 Dated at St. Johnsbury, in the county of Caledonia, this 7th day of May, A. D. 1900.

ALBRO F. NICHOLS, *Clerk.*

Harland B. Howe recognized to the defendant and to each of the above named trustees in the sum of twenty dollars, as surety for the costs of prosecution, as the law directs.

Before me,

ALBRO F. NICHOLS, *Clerk.*

STATE OF VERMONT, *Caledonia County,* } ss:

At St. Johnsbury this 7th day of May, A. D. 1900, I then served this writ on the within named trustee F. S. Harriman by delivering to him a true and attested copy of the original writ and my return hereon thereon endorsed, and on the 8th day of said May I made further service of the same on the within named trustee, J. E. Hartshorn, by leaving for him a true and attested copy of the original writ at the house of his then usual abode in the hands of Mrs. Gilbert E. Woods, a person of sufficient discretion to receive the same, and on the same day I made further service of the same by attaching as the property of the within named defendant one white mare called Mollie, one pair of chestnut mares known as the Bailey and Jewett mares, one chestnut horse with one eye, called Tom, one chestnut mare called Mattie, one bay mare called Mertie, one pair of bay horses called the Packard horses, six white shoats weighing about one hundred and fifty pounds each, two piano top buggies manufactured by the Boston Buck-Board Company, two two-seated wagons manufactured by the Boston Buck-Board Company, four Corning top buggies, with end springs manufactured by the Boston Buck-Board Company, one open Concord wagon painted yellow, one top phaeton with rubber tires, manufactured by the Boston Buck-Board Company, one lumber wagon, five rubber trimmed driving harnesses, five nickel trimmed driving harnesses, one pair rubber trimmed driving harnesses, one pair nickel trimmed driving harnesses, five single sleighs, one two seated sleigh, two white fur robes, ten black fur robes, four heavy street blankets, fifteen light lap robes, one stallion with white face called Corbett, all said property now in the possession of the said defendant at the livery stable now occupied by him, situated on the east side of Main street, in said St. Johnsbury, also, three yearling colts described as follows, two of last mentioned colts being bay color, and one of said colts being chestnut color, and fifteen shoats weighing about one hundred and fifty pounds each, the said last mentioned colts and said last mentioned shoats now in the possession of the said defendant on the farm now occupied by him situated on the highway leading from St. Johnsbury to North Danville, in the said town of St. Johnsbury, also one two seated wagon now in the possession of John H. Ryan, at his factory on Railroad street, in said St. Johnsbury, and on the same day I lodged a true and attested copy of this attachment in the town clerk's office in the town of St. Johnsbury, and this my return hereon thereon indorsed, and on the 9th day of May, at St. Johnsbury, in

24

the county of Caledonia, I gave the defendant a true and attested copy of the original writ, and a list of the personal property so attached, and this my return hereon, thereon indorsed.

Attest: W. H. WORTHEN,
Deputy Sheriff.

4 copies	$5.00
4 miles	.40
Town clerk	.25
	$5.65

(Indorsed:) No. 1201. John H. Ryan *vs.* Herbert E. Moore & Trs. Caledonia county court. Dated May 7, 1900. 21 days expires May 28, 1900. 42 days expires June 18, 1900. Harland B. Howe, att'y. Entered and docketed this 9th day of May, A. D. 1900. Rolfe Cobleigh, deputy clerk.

25 PL'FF'S EX. 2, G. M. P.

Mortgage Deed, Personal Property.

Herbert E. Moore
to
Henry Fairbanks.

Know all men by these presents: That Herbert E. Moore of St. Johnsbury in the county of Caledonia and State of Vermont, in the consideration of one thousand dollars paid to my full satisfaction by Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, by these presents do sell and convey to the said Henry Fairbanks and his assigns forever, the following described articles of personal property, viz:

All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange.

Warranted free from encumbrance and against any adverse claims except prior claims to said Henry Fairbanks.

Upon condition that if I well and truly pay or cause to be paid to the said Henry Fairbanks all that I now owe him or may owe him hereafter by note, book account, or in any other manner and shall well and truly save the said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void, otherwise of force.

In witness whereof I hereunto set my hand and seal this 15th day of April, A. D. 1891.

HERBERT E. MOORE. [L. S.]

In presence of

ALBRO F. NICHOLS.
ALEXANDER DUNNETT.

STATE OF VERMONT, } ss:
Caledonia County, }

26 At St. Johnsbury this 15th day of April, A. D. 1891, Herbert E. Moore personally appeared, and acknowledged this instrument, by him sealed and subscribed, to be his free act and deed.

Before me,

ALEXANDER DUNNETT,
Master in Chancery.

We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the condition thereof and the contemplated loan and liability and for no other purpose whatever, and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the honest purpose of enabling the grantor to raise money for use in his livery business.

HERBERT E. MOORE. HENRY FAIRBANKS.

STATE OF VERMONT, } ss:
Caledonia County, }

I hereby certify that the foregoing affidavit was subscribed and sworn to by Herbert E. Moore and Henry Fairbanks this 17th day of April, A. D. 1891.

Before me,

ALEXANDER DUNNETT,
Master in Chancery.

St. Johnsbury, town clerk's office.

APRIL 18, A. D. 1891, at 8 o'clock a. m. received the deed of which the foregoing is a true record.

Attest: E. D. BLODGETT, *Town Clerk.*

St. Johnsbury, town clerk's office.

THIS 3D DAY OF SEPTEMBER, A. D. 1901.

I hereby certify the within to be a true copy of record of mortgage deed of personal property as found in Book No. 3, on page 131, chattel mortgage records of St. Johnsbury.

Attest: E. D. BLODGETT, *Town Clerk.*

27 Return of sheriff's sale of mortgage property recorded in Book 3, page 131, personal property, Henry Fairbanks *vs.* Herbert E. Moore.

STATE OF VERMONT, } ss:
Caledonia County, }

ST. JOHNSBURY, *May 16th*, 1900.

By virtue of this mortgage and by the direction and consent of the mortgagor and the mortgagee I took possession of the following described property as pointed out by the mortgagor as the property covered by this mortgage, to wit: one chestnut horse called Tom, 1 gray mare called Mollie, 1 pair chestnut mares called the Bailey & Jewett mares, 1 pair bay mares called the Packard mares, 1 mare called Mattie, 1 mare called Mertie, 1 piano box buggy, Calland make, 1 top buggy Boston B. make, 3 Corning top buggies same make, 1 phaeton rubber tire, 1 old phaeton, one two seated canopy top surrey, rubber tires, B. B. make, new last year, 1 two seated surrey, same make, steel tires, just repaired, 1 two seated surrey same make, new 3 years ago, 1 single top buggy, Union Carriage Co., rubber tires, 1 Concord buggy, 1 express wagon, 1 lumber wagon, 1 two seated sleigh, 1 three seated sleigh, 1 top sleigh, 4 single sleighs, 2 set- double driving harnesses, 9 single harnesses, 4 street blankets, 7 black Jap robes, 2 grey robes, 6 heavy fall lap robes, 20 summer robes, 10 carriage mats, 6 whips, and on the same day I advertised the same for sale at public auction as the law directs by posting up a notification in two public places in said town that the same would be sold by me at public auction on the fourth day of June, A. D. 1900 at ten o'clock in the forenoon to satisfy said mortgage with legal costs at the livery stable formerly known as H. E. Moore livery stable on Main street in the village and town of St. Johnsbury, at which time and place I attended and adjourned said sale to the 11th day of June at the same place and the same time in the day by posting up notifica-
28 tions as before, at which last time and place I attended, and I then and there proceeded to sell said property as advertised, and I sold of said property to Ernest Morrill as follows, the horse called Tom for $42.50, the Bailey & Jewett horses for $82.50, the Packard mares for $87.00, the gray mare Mattie for $51.00, one

phaeton for $100.75, 1 buggy for $18.00, the Concord buggy for $10.00, 1 buggy for $18.00, 1 buggy for $17.00, 2 lap robes for 85 cents, 4 mats for 80 & 1.95, 2 street blankets, $3.25, 5 black fur robes & 1 grey robe, 6 in all for $19.50, 4 single harnesses for $14.75, 1 pair double harnesses for $20.00, the express sleigh for $16.50, 2 single sleighs for $12.00, the top sleigh for $13.50, 6 whips for 40c. he being the highest bidder for the same, and I sold to R. B. Gammell 1 mare Mattie for $26.00, 1 surrey for $20.00, 1 sleigh for $20.00, 5 lap robes for $2.85, 2 mats for 15 cents, 3 single harnesses for $4.25, 1 pair double harnesses for $8.25, and to L. H. Lucas, the express wagon for $13.50, 2 lap robes for 30 cts., 1 harness for $2.50, 1 blanket, 30 cts., and to John Moore the mare Mertie for $29.00, and to G. Adkins 1 buggy for $15.50, to C. B. Weeks the old phaeton for $3.75, to Ellery Clark 1 canopy top surrey with pole for $94.00, (repaired Ryan wagon), 3 lap robes, $2.80, to Jared Peck, 1 lap robe for $1.35, to McMclain, 1 robe for 80 cts., W. F. Thomas 2 lap robes, 55 cts., to H. I. Woods 1 robe, 50 cts., and J. McLeod 1 robe $.25, to A. Gaffany 1 robe 20c. to George Gagnon 1 street blanket for $2.50 and 1 black fur robe for $4.00, to S. J. Lyon 1 grey robe for $3.00, to F. Thomas 1 g. robe 50 cts., to C. Varney 1 harness for $1.75, to L. Plant the lumber wagon for $1.00, to J. M. Allen 1 sleigh for $4.25, they being the highest bidders respectively for the same, and to Henry Fairbanks 1 buggy for $60.00, one for $125.00, one for $35.00, he being the highest bidder for the same; and out of the proceeds of said sales, which amounted in the whole to the sum of $1,016.95 *dollars*,
29 I applied in the first place to satisfy the legal costs and charges of said sales and the keeping and care of said property as per bill of fees hereto connected and also a lien for repairs upon one surrey to J. H. Ryan which amounted in the whole to the sum of $168.37, which sum is to be diminished by the amount received by me for the use and rental of said property while in my hands to the amount of $73.50 leaving the net cost and expenses of said sale and expenses to the amount of $94.87, which left a balance to be applied on this to the amount of $922.08, which I have paid over to Henry Fairbanks, the mortgagee on this mortgagee, and now on this 10th day of July, A. D. 1900, I have caused this my doings herein recorded in the town clerk's office in the town of St. Johnsbury where this mortgage is recorded.

Attest: LORENZO SULLOWAY, *Sheriff.*

Bill of Fees.

Travel	$.50
Advertising	2.00
Livery	11.00
Town clerk	1.00
Keeping horses	53.99
J. McGowan	31.00
Dr. Buss	10.50

N. E. Richards	9.13
Telephone	2.50
R. B. Gammell	10.00
H. Fairbanks, rent	10.00
J. H. Ryan, repairs	26.65
	$168.37

St. Johnsbury, town clerks office.

JULY 10, A. D. 1900.

Received for record at 9 o'clock 45 minutes a. m., and of which the foregoing is a true record.

Attest: E. D. BLODGETT, *Town Clerk.*

Memorandum.

Herbert E. Moore to Henry Fairbanks, Dr.

May 22, 1899.	To 13⅔ mos. rental $15	$204.90
	" 6 extra horses @ 50c	40.98
May 22, 1900.	To interest 1 year on $245.88	14.75
30 May 2, 1900.	" 12 mos. rental $15	180.00
	" 6 extra horses	36.00
May 22, 1900.	To paid protested note F. N. bank	526.27
		$1002.90
Feb'y 9, 1900.	By $40.00 and interest received	40.68
May 22, 1900.	Amount due	$962.22

St. Johnsbury, town clerk's office.

SEPTEMBER 4TH, A. D. 1901.

I hereby certify the foregoing to be a true copy of record as found in Book 5 on pages 539 and 540, chattel mortgage records, St. Johnsbury.

Attest: E. D. BLODGETT, *Town Clerk.*

31 PL'FF'S EX. 3, G. M. P.

Mortgage Deed, Personal Property.

Herbert E. Moore
to
Henry Fairbanks.

Know all men by these presents: That I Herbert E. Moore of St. Johnsbury in the county of Caledonia and State of Vermont in the consideration of three thousand dollars paid to my full satisfaction

by Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, by these presents do sell and convey to the said Fairbanks and his assigns forever the following articles of personal property, viz:

All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, whips, &c., also all other livery property which I may purchase in my business or acquire by exchange; all said property now owned by me being situated at my stable in the village of St. Johnsbury on Main street. Also my stallion named "Corbett" kept at the same place.

Warranted free from encumbrance and against adverse claims except to said Fairbanks and a mortgage upon said "Corbett" to Harry L. Moore duly recorded.

Upon condition that if I pay or cause to be paid all indebtedness of every nature from me to said Fairbanks present and future and save him harmless and indemnified from and by reason of every liability he has already assumed or may hereafter assume for me by way of surety, endorser or otherwise and especially all that I may owe him by way of rentals and the liability he has assumed for me upon a note held by the First National Bank of St. Johnsbury for $525.00, dated Nov. 22, 1899, payable in six months to his order and endorsed by him, the proceeds of which note I have had, and any and all notes that may be given on renewal thereof, and the liability he has assumed for me upon a note held by the Passump-
32 sic Savings Bank of St. Johnsbury dated March 1, 1900, for $2510.75 signed by me and by him as surety and any renewal or renewals thereof, then this instrument shall be void otherwise of full force.

In witness whereof I hereunto set my hand and seal this 5th day of March, A. D. 1900.

HERBERT E. MOORE: [L. S.]

In presence of
WENDELL P. STAFFORD.

STATE OF VERMONT, *Caledonia County,* } ss:

At St. Johnsbury this 5th day of March, A. D. 1900, Herbert E. Moore personally appeared and acknowledged this instrument by him sealed and subscribed to be his free act and deed.

Before me,

WENDELL P. STAFFORD,
Master in Chancery.

We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the conditions thereof and for no other purpose whatever and that the same is a just debt honestly due and owing from the mortgagor to the mortgagee and the other liability is honest and truly stated and the

contemplated loans and liability are honest and to be made and incurred for the purpose of enabling said Moore to obtain money to use in his livery business.

HERBERT E. MOORE. HENRY FAIRBANKS.

STATE OF VERMONT, }
Caledonia County, } *ss:*

I hereby certify that the foregoing affidavit was subscribed and sworn to by said Herbert E. Moore and Henry Fairbank this 5th day of March, A. D. 1900.

Before me,

WENDELL P. STAFFORD,
Master in Chancery.

St. Johnsbury, town clerk's office.

MARCH 5, A. D. 1900, at 4 o'clock — minutes p. m.

Received the deed of which the foregoing is a true record.

Attest: E. D. BLODGETT, *Town Clerk.*

St. Johnsbury, town clerk's office.

AUGUST 22ND, A. D. 1901.

33 I hereby certify the foregoing to be a true copy of record of mortgage as found in Book 5, page 34 of chattel mortgage records of this office.

Attest: E. D. BLODGETT, *Town Clerk.*

Assignment Personal Mortgage.

Henry Fairbanks
to
Passumpsic Savings Bank.

Know all men by these presents that I Henry Fairbanks of St. Johnsbury in the county of Caledonia and State of Vermont, in consideration of one dollar paid to my full satisfaction by the Passumpsic Savings Bank of St. Johnsbury in the county of Caledonia and State of Vermont do hereby assign, transfer and convey unto the said The Passumpsic Savings Bank, successor and assigns forever all my right, title, interest and estate in and unto the property conveyed by the within mortgage and all my rights and privileges under said mortgage.

In witness whereof I hereunto set my hand and seal this 23d day of March, A. D. 1900.

HENRY FAIRBANKS. [L. S.]

In presence of:
C. S. ADAMS.
W. S. BOYNTON.

STATE OF VERMONT, *Caledonia County,* } ss:

At St. Johnsbury this 23d day of March, A. D. 1900, Henry Fairbanks personally appeared and acknowledged this instrument by him sealed and subscribed to be his free act and deed.
Before me,

W. S. BOYNTON,
Notary Public.

St. Johnsbury, town clerk's office.

MARCH 23, 1900.

Received at 2 o'clock p. m. of which the foregoing is a true record.
Attest: E. D. BLODGETT, *Town Clerk.*

St. Johnsbury, town clerk's office.

AUGUST 22ND, A. D. 1901.

I hereby certify the within and foregoing to be a true copy of record of assignment of mortgage as found in Book 5, page
34 528, records of chattel mortgages &c. for town of St. Johnsbury.
Attest: E. D. BLODGETT, *Town Clerk.*

35 District Court of the United States, District of Vermont.

In the Matter of HERBERT E. MOORE, Bankrupt. In Bankruptcy.

A Petition for an Order to Preserve a Certain Lien.

Your petitioner Frank D. Thompson, trustee in the above entitled matter, respectfully represents to your honorable court that on the 15th day of April, A. D. 1891, a paper writing was signed and delivered by said Moore purporting to be a chattel mortgage of "all my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange," purporting to convey all said livery property and after acquired property to one Henry Fairbanks of St. Johnsbury in the county of Caledo-

nia and State of Vermont, to secure all indebtedness then owing, or that might be owing from said Moore to said Fairbanks, and to secure said Fairbanks harmless from paying any commercial paper of said Moore on which he said Fairbanks, might become holden as surety or endorser.

Your petitioner further states that said instrument does not in any way describe said livery property other than is above stated, and does not state where said property was situated.

That on the 7th day of May, A. D. 1900, the said Moore had as livery property, in his livery stable at said St. Johnsbury the following described property, viz., one white mare called Mollie, one pair of chestnut mares known as the Bailey and Jewett mares, one chestnut horse with one eye, called Tom, one chestnut mare called Mattie, one bay mare called Mertie, one pair of bay horses called
36 the Packard horses, two piano top buggies manufactured by the Boston Buck-Board Company, one open Concord wagon painted yellow, four Corning top buggies with end springs manufactured by the Boston Buck-Board Company, two two-seated wagons manufactured by the Boston Buck-Board Company, one top phaeton with rubber tires manufactured by the Boston Buck-Board Company, one lumber wagon, one two seated wagon, five rubber trimmed driving harnesses, five nickle trimmed driving harnesses, one pair rubber trimmed driving harnesses, one pair nickle trimmed driving harnesses, five single sleighs, one two seated sleigh, two white fur robes, ten black fur robes, four heavy street blankets, fifteen light lap robes.

That all of said livery property with the exception of the horse called Tom and the mare called Mattie was acquired by the said Moore subsequently to the giving of the said paper writing purporting to be a chattel mortgage.

That your petitioner is advised and believes that under the laws of Vermont, on the said 7th day of May, A. D. 1900, said paper writing purporting to be a chattel mortgage was void and of no effect as against attaching creditors of said mortgagor.

That on the said 7th day of May, A. D. 1900, John H. Ryan of said St. Johnsbury prayed out a writ in his favor against said Moore returnable to the Caledonia county court, praying for an attachment to the amount of six hundred dollars. That said writ was duly served by attaching all of said livery property, and duly returned and entered in said court within twenty one days from the date thereof. That said suit is now pending in said Caledonia county court.

That on the 16th day of May, A. D. 1900, the said Henry Fairbanks by virtue of said chattel mortgage herein above mentioned, took possession of all of said livery property and advertised all of said livery property to be sold on the 4th day of June, A. D. 1900, to satisfy the claims of said Fairbanks against said bankrupt.
37 That said sale was continued until the 11th day of June, A. D. 1900, on which date all of said livery property was sold by

virtue of said chattel mortgage, and the proceeds of said sale received by said Fairbanks.

That on the 30th day of June, A. D. 1900, said Moore filed his petition in bankruptcy, that on the 3d day of July, A. D. 1900, said Moore was adjudged a bankrupt, and such proceedings were thereafter had that your petitioner was duly appointed trustee of the estate of said Moore in bankruptcy, accepted said trust, qualified, and is now discharging the duties of said appointment.

Your petitioner is advised and believes that the United States bankrupt act of 1898, and said proceedings in bankruptcy bar the further prosecution of said suit by the plaintiff therein and that said Ryan is prevented by said Moore having been adjudged a bankrupt from enforcing his rights under said attachment as against a lien attempted to be created by said chattel mortgage, and that your petitioner as trustee of the estate of said bankrupt is by section 67 of said act subrogated to and may enforce such rights of said Ryan as against said pretended chattel mortgage for the benefit of the estate of said bankrupt.

That your petitioner is advised and believes that under and by virtue of said section 67, your petitioner may by virtue of said act and permission of your honorable court enter as plaintiff in said suit and carry on and prosecute the same to final judgment, and secure the same benefits of said attachment as against said pretended chattel mortgage for said estate and all unsecured creditors which said plaintiff would have secured thereby if bankruptcy had not intervened.

Wherefore your petitioner prays that your honorable court will take this matter into consideration and grant your petitioner leave to enter and prosecute said suit, and make an order that the
38 rights under such attachment lien created by such attachment, shall be preserved for the benefit of the estate of said bankrupt in the hands of your petitioner.

FRANK D. THOMPSON, *Trustee.*

UNITED STATES OF AMERICA, }
District of Vermont. }

At St. Johnsbury in said district this 11th day of March, A. D. 1901, personally appeared Frank D. Thompson, and made oath that the allegations in the foregoing petition are true to the best of his knowledge, information and belief.

Before me,

DAVID E. PORTER,
Master in Chancery.

I, John H. Ryan of St. Johnsbury hereby accepts service of the foregoing petition of Frank D. Thompson, trustee in the matter of

Herbert E. Moore in bankruptcy and of due notice of the hearing thereon, and waive any further or different notice thereof.

Dated at St. Johnsbury this 11th day of March, A. D. 1901.

JOHN H. RYAN.

Facts Agreed on for This Hearing.

In 1885 Mr. Fairbanks purchased in the village of St. Johnsbury premises which had a livery stable on them. Herbert E. Moore the bankrupt who had worked for him applied to him to rent the stable and to aid him in purchasing the stock then in the stable. Mr. Fairbanks rented the stable and aided him by endorsing his paper to purchase the stock, and took as security the chattel mortgages of 1886, 1888, and 1891. The first two mortgages were given to enable him to remove two mortgages then on the property and the third to secure Mr. Fairbanks for the aid already furnished and to add to the stock in the stable. Mr. Moore continued to carry on the business in the stable under his lease with the aid of Mr. Fairbanks by endorsing until May 1900, when the sheriff took possession for Mr. Fairbanks under the mortgage and sold the property as shown by his return.

39 Mr. Moore had paid his bills promptly down to the spring of 1900.

Whether Mr. Fairbanks knew or ought to have known that he was insolvent when the sheriff took possession is a controverted question. During these years Mr. Moore had made changes in the stock by sale, exchange and new purchase, with the consent of Mr. Fairbanks and frequently on consultation as to the particular change contemplated.

John H. Ryan on May 8th attached the stock in the stable, and other stock as shown by his writ. This was shortly before Mr. Fairbanks had the sheriff take possession under his mortgage. Mr. Ryan claims there was due him balance on note and account Sept. 15, 1900, $304 and some cents. His suit was duly entered in Caledonia court and is there now pending. He will not prosecute his suit further, and he has not proved his debt. There are proved against the -state between 5000 and 6000 dollars. The one proved by Passumpsic savings bank for about $2600, Mr. Fairbanks is holden to pay.

Frank D. Thompson was duly chosen and appointed trustee in the bankruptcy proceedings. He found there was an unsettled deal between Mr. Moore and Fred C. Harriman who is one of the trustees in the Ryan suit and settled with him, and in addition of procuring Harriman to pay a note on which he was endorser at the Citizens' savings bank which had been proved against the estate, of $800, received $250 in cash which he now holds.

FRANK D. THOMPSON.
HENRY FAIRBANKS,
By his attorney, JONATHAN ROSS.

United States District Court, District of Vermont.

In re HERBERT E. MOORE, Bankrupt.

40 WHEELER, *J.*:

The laws of the State provide for chattel mortgages, and for verification of the debt by affidavit appended to the mortgage, and:

"SEC. 2255. If such mortgage is given to indemnify the mortgagee against liability assumed, or to secure the fulfilment of an agreement other than the payment of a debt due from the mortgagor to the mortgagee such liability or agreement shall be stated specifically in the condition of the mortgage, and the affidavit shall be varied as to verify the validity and justice of such liability or agreement."

April 15, 1891 the bankrupt, a liveryman, executed to Henry Fairbanks a mortgage with description of property as:

"All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc., also all horses and other livery property that I may purchase in my business or acquire by exchange."

The condition was:

"If I well and truly pay or cause to be paid to the said Henry Fairbanks all that I now owe him or may owe him hereafter by note, book account or in any other manner, and shall well and truly save the said Henry Fairbanks harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my benefit as surety, endorser or otherwise, then this deed shall be void."

The affidavit was:

"We severally swear that the foregoing mortgage is made for the purpose of securing the debt and other liability specified in the condition thereof and the contemplated loans and liability and for no other purpose whatever, and that the same is a just debt, honestly due and owing from the mortgagor to the mortgagee, and the other liability is honest and the contemplated liability is for the
41 honest purpose of enabling the grantor to obtain money for use in his livery business."

May 8, 1900 John H. Ryan caused some of the originally mortgaged and the after acquired livery property, with some other property of the bankrupt to be attached by copy in the town clerk's office made by statute equivalent to possession, and caused one Harriman, a debtor of the bankrupt to be summoned as a trustee of the bankrupt, in a suit now pending to recover a debt of $304.00.

May 16, 1900 Fairbanks caused an officer under a State statute with consent of the bankrupt to foreclose the mortgage by taking possession of all the livery property on the mortgage, and advertising it, and June 4th selling it for $1,016.95, which after paying expenses of $94.87 was applied upon this account of debts secured by the mortgage:

"Herbert E. Moore to H. Fairbanks, Dr.

Settled to Mar. 31, 1898, by final payment to Oct., 1898.

May 22, 1899.	To 13¾ months rental @ $15	$204.90
	" 6 extra horses, 50c each.....	40.98
May 22, 1900.	" interest 1 year, $245.88	14.75
	" 12 months rental @ $15	180.00
	" 6 extra horses, 50c each.....	36.00
		$476.63
May 22, 1900.	Paid protested note at 1st. nat. bank	526.27
		$1002.90
Feb. 9, 1900.	By $40. and interest received.....	40.68
	Amount due May 22, 1900.....	$962.22"

The mortgagor was adjudged a bankrupt on his own petition July 3, 1900. The trustee has received $250.00 from the debtor summoned as trustee in Ryan's suit.

This is a petition by the trustee, on notice to, and appear-
42 ance by Fairbanks, for an order that Ryan's attachment may be preserved as a lien for the benefit of the estate in bankruptcy. It is held in this State that possession of after acquired property under a mortgage is good as of the date of the mortgage against an assignee in insolvency. Peabody *vs.* Landon, 61 Vt. 318. The object is to avoid the effect of Fairbanks' possession under his mortgage of the after acquired property. Being within four months of the bankruptcy the attachment is wholly void as to Ryan, and as to all others, unless so ordered to be preserved. Bankrupt act. sec. 67*f*. The lien can be only such as Ryan would have if it had not been avoided as to him by the bankruptcy proceedings, which would amount to only $304.00, the amount of his claim, and costs, and the costs would have to be paid to enforce the lien. His lien covered as well the debt of Harriman as the livery property; he could have but one satisfaction, and it can be preserved for the benefit of the estate for no more. As the trustee has received $250.00 there remains but $54.00 as the extent to which the lien can be preserved by the order sought. Whether the trustee can treat the lien as void in part and be entitled to have it preserved by order of court in part, or can only have it all one way or all the other, is not clear.

None of the debts or liabilities on which the mortgage was foreclosed appears to have existed till more than six years after the mortgage was given, and but $245.88 of it till well within four months before bankruptcy proceedings; and whether a chattel mortgage as such can be good to cover such wholly future debts or

liabilities, or be made good for that purpose by possession given under it as against a trustee in bankruptcy does not appear to have been settled. It would be good between the parties, and so would a pledge, at any time, but if what would make it good took place within four months of the bankruptcy proceedings it might
43 become wholly void by the bankrupt act, sec. 67*e*; and this foreclosure might be void as a levy "through legal proceedings," under 67*f*. The trustee might be embarrassed about enforcing the provisions of the act making the mortgage lien of the foreclosure proceedings void in his own name, and enforcing Ryan's lien by attachment, if it should be preserved here, in the sheriff's name, on the same property, at the same time.

The spirit of the bankrupt act does not lead to the destruction of lawful liens; and its provisions should not be used to displace one by another for the purpose of defeating it without good cause. Under the circumstances it is thought to be most proper and just that these liens be left to stand or fall upon their respective merits, in their several places.

Petition dismissed.

Clerk's office, U. S. district court, district of Vermont.

BURLINGTON, VT., *November* 27, 1901.

I hereby certify that the above and foregoing are true copies of petition for order to preserve a certain lien, agreed statement of facts and decision of court, *In re* Herbert E. Moore, bankrupt, now remaining on file in my office.

[L. S.] GEO. E. JOHNSON, *Clerk*.

44 STATE OF VERMONT, }
Caledonia County, } ss:

I, Albro F. Nichols, clerk of the supreme court of the State of Vermont for the county of Caledonia, which is a court of record, having a seal as hereto attached, do hereby certify that the foregoing is a true copy of the original record, and of plaintiff's exceptions and of exhibits therein referred to, in the cause entitled; Frank D. Thompson, trustee, *vs.* Henry Fairbanks, by said court heard and determined at a term thereof begun and held at Montpelier in the county of Washington, for the county of Caledonia, on the second Tuesday of May, A. D. 1903, as appears by the said original record, plaintiff's exceptions and exhibits, now remaining in the office of the clerk of said supreme court for the county of Caledonia, by me this day examined and herewith compared.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court at St. Johnsbury in the county of Caledonia and State of Vermont, this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk*.

45 Supreme Court of Vermont, Caledonia County, May Term, 1903.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt,
vs.
HENRY FAIRBANKS.

TYLER, MUNSON, START, WATSON, and HASELTON, JJ.

WATSON, *J.:*

Sometime before June 22, 1886, the bankrupt, Herbert Moore, bought a livery stock and business in St. Johnsbury village. In part payment therefor, he assumed a mortgage then outstanding on the property. The business then was and continued to be carried on in buildings leased of the defendant. Shortly before March 1, 1888, the defendant assisted Moore to pay the assumed mortgage by signing a note with him for $1425 payable to the Passumpsic Savings Bank of St. Johnsbury. Defendant also signed other notes with Moore,—one for $350 dated July 15, 1890, payable to the same bank, and two notes payable to the First National Bank of St. Johnsbury, one for $750 dated June 22, 1886, and one dated June 23, 1889. The sum for which this last note was given does not appear.

On April 15, 1891, Moore gave the defendant, as security, a chattel mortgage on the livery property, and it was recorded on the 18th day of the same month. The description of the property is "All my livery property consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc. Also all horses and other livery property that I may purchase in my business or acquire by exchange." The mortgage is conditioned for the payment of all that the mortgagor then owed the mortgagee, or might thereafter owe him, "by note, book account, or in any other manner." and for the saving of the mortgagee "harmless and indemnified from paying any commercial paper on which he has become or may hereafter become holden in any manner for my (the mortgagor's) benefit as surety, endorser or otherwise."

46

On May 5, 1891, defendant signed another note with Moore, payable to the Passumpsic savings bank, and on March 1, 1900 the three notes given to that bank by Moore with the defendant as signer, as before stated, were merged in a note of that date signed by Moore and by the defendant as surety, for $2510.75, payable to the bank on demand. This note has not been paid, and although specified in the condition of the mortgage assigned to the bank, as one of the debts secured thereby, it has been proved by the bank as an unsecured claim against the bankrupt estate. The defendant signed other notes with Moore from time to time, in renewal and otherwise, payable to the First national bank.

After deducting payments made on the notes to the last named

bank, the aggregate sum due thereon was put into a new note dated November 21, 1892, signed in the same way. This note, amounting to $526.27, was paid by the defendant on June 4, 1900. These notes were all signed by the defendant to assist Moore in carrying on, building up, and equipping his livery stable and livery business, and as between them belonged to Moore to pay.

On March 5, 1900, Moore gave the defendant another chattel mortgage on the livery stock. Later in the same month, this mortgage was assigned by the defendant to the Passumpsic savings bank, by which it has hitherto been held and owned. On May 7, 1900, one John Ryan, a creditor of Moore, issued his writ against him declaring in general assumpsit for $500 in damages, and caused the livery stock to be attached thereon. On the 16th. day of the same month,
47 the defendant acting under the advice of his attorney and with the consent of Moore, took possession under his mortgage of April 15, 1891, of all the livery property then on hand, and on the 11th. day of June following, he caused the same to be sold at public auction by a public officer in due form under the provisions of the statute. By arrangement between Moore's attorney and the defendant's attorney, the property was thus to be sold, and the avails held by the officer in place of the property for the one who should prove to be entitled thereto; but neither Moore nor his attorney consented that the avails might be applied on the defendant's debts. On the 30th day of June, Moore filed his voluntary petition in bankruptcy, he was adjudged a bankrupt thereon, and the plaintiff was appointed trustee in bankruptcy of the estate, and he is now acting as such.

The petition in bankruptcy was filed within four months after the giving of the mortgage assigned to the Passumpsic savings bank, hence that mortgage became null and void under the bankrupt law of 1898, sec. 67, *e*. For the purpose of defeating the effect of defendant's taking possession of the property under the mortgage, the plaintiff brought his petition to the court of bankruptcy under the provisions of sub-division *f* of that section, for an order that Ryan's attachment might be preserved as a lien on the property for the benefit of the estate in bankruptcy. But upon hearing, the petition was dismissed. Since the attachment was made within four months prior to the filing of the petition in bankruptcy, the lien created thereby could be preserved only by an order from that court for such purpose. Without such order the attachment, like the last named mortgage, became null and void. Section 67, *f*. With the bank's mortgage and the attachment thus invalidated the defendant's rights under his mortgage of April 15, 1891, stood the same as though there had been no subsequent
48 mortgage given, nor attachment made. It is urged that with the annulment of the attachment, the property affected by it passed to the trustee as a part of the estate of the bankrupt under the express provisions of *f*. There would be more force in this contention were it not for the provision that, by order of the

court, an attachment lien may be preserved for the benefit of the estate. If there is no other lien on the property, there can be no occasion for such order; for on the dissolution of the attachment, the property, unless exempt, would pass to the trustee anyway. It is only when the property for some reason may not otherwise pass to the trustee as a part of the estate that such an order is necessary. We think such is the purpose of that provision, and that unless the lien is thus preserved, the property, as in the case at bar, may be held upon some other lien and not pass to the trustee. *In re.* Sentenne & Green Co., 120 Fed. 436.

The question then arises whether the defendant by virtue of his mortgage and the taking possession of the property thereunder had a lien on the property taken and sold paramount to the rights of the plaintiff as trustee under the bankrupt law. The plaintiff contends that the defendant did not have a lien valid against creditors under that act, and he seeks to recover the amount received by the defendant from the sale of the property. The parties to the mortgage are described therein as of St. Johnsbury, etc. Beyond what may be inferred from this fact, there is nothing in the mortgage showing where the property was located.

The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor; sometimes without communication with or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock or with the avails of the old stock sold, or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

49

The plaintiff contends that the mortgage is void, because (1) the description of the property is insufficient; (2) in neither the condition nor the affidavit is the description of the debt as specific as the law requires; also that the mortgage was invalid as to the after-acquired property. However the law might be upon these questions if the mortgagor had retained possession of the property until after the filing of the petition in bankruptcy, there would seem to be but

little doubt regarding it as the case stands. The property expressly described in the mortgage was the mortgagor's livery property and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of
50 goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of its date, are questions too well settled in this State to need further discussion. Peabody *vs.* Landon, 61 Vt. 318; 15 Am. St. Rep. 903; Rice's Assignees *vs.* Hulett, 63 Vt. 321; *In re* Allen's estate, 65 Vt. 392; McLoud *vs.* Wakefield, 70 Vt. 558.

It is found that when the defendant took possession of the property he knew that the mortgagor was insolvent, and was considering going into bankruptcy; that he did not intend to perpetrate any actual fraud on the other creditors or any of them; but that he did intend thereby to perfect his lien on the property and make it available for the payment of his debt before other complications by way of attachment or bankruptcy arose. He then understood that Ryan's attachment would probably hold good against his mortgage. There is no finding that the thus parting with the possession of the property by the mortgagor was with the purpose on his part to hinder, delay, or defraud his creditors, or any of them. Without a finding to this effect, it cannot be said that there was any invalid transfer of the property within the provisions of sec. 67, *e*, of the bankrupt law. Sabin *vs.* Camp, 98 Fed. 974.

The plaintiff further contends that such transfer constituted a preference within the meaning of that law. Sec. 60, subdivision *a*, declares what shall constitute a preference, and subdivision
51 *b* provides that if a bankrupt shall have given a preference within four months before the filing a petition, or after it is filed and before adjudication, "and the person receiving or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." It is unnecessary, however, to determine whether the taking possession of the property by the defendant under this mortgage with the consent of the mortgagor was a preference under subdivision *a*. For if it was, it is not voidable by the trustee, under subdivision *b* unless the defendant

or his agent had reasonable cause to believe that it was intended thereby to give a preference. Pirie *vs.* Chicago Title & Trust Co., 182 U. S. 438, 45 L. Ed. 1171.

The mortgage under which the defendant acted was given more than seven years before the enactment of the bankrupt law. The case shows that possession was not taken until after the condition was broken, for it is found that at that time there was due the defendant on open account for rent overdue of $269.19. As a mortgage under the common law, when the condition was not duly performed, the whole title to the property vested absolutely at law in the mortgagee, subject to the mortgagor's right in equity to redeem the same as in the case of a mortgage of lands. 2 Story Eq. Jur. s. 1030; Wood *vs.* Dudley, 8 Vt. 430; Blodgett *vs.* Blodgett, 48 Vt. 32. And the defendant had the right to perfect his title against creditors of the mortgagor by taking possession of the property. Coty *vs.* Barnes, 20 Vt., 78.

There is no finding that the defendant or his agent had reasonable cause to believe that by the change of possession it was intended to give a preference. This fact must affirmatively appear. We cannot infer it from the other facts reported. Darby
52 *vs.* National Bank, 57, Vt. 370. The fair construction of the findings is that the parties were but carrying out the provisions of the contract of mortgage as it was well understood between them before the bankrupt act was passed, with a view to their respective rights under the contract, rather than any preference was intended by either. Nor does the property covered by defendant's mortgage pass to the trustee under the provisions of subdivision *f*, whereby all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him are deemed null and void in case he be adjudged a bankrupt, and the property affected thereby is deemed wholly discharged and released from such lien and passes to the trustee as a part of the estate.

The question of intent does not arise under these provisions, but to come within them the lien in question must have been obtained through legal proceedings within the prohibited period. It cannot be said that the creation of a lien is the same as the enforcement of one already created. Assuming that the taking and sale of personal property by a public officer upon a statutory chattel mortgage under the provisions of V. S. 2265–2268, constitutes a legal proceeding within the meaning of the above provisions of the bankrupt law, as was recently held by Wheeler, J., in the matter of Parker P. Ball, bankrupt, 123 Fed. 164, it does not follow that the mortgage lien is thereby rendered null and void; for instead of being a lien obtained through such legal proceedings, it is an existing lien by contract enforced by them.

As already seen, the defendant's lien under this mortgage at common law was one that gave him an absolute legal title afterforfeit-

ure, which occurred before possession was taken by him. But it was necessary that a change of possession be had to render his
53 title operative against the other creditors of the mortgagor. Tobias *vs.* Francis, 3 Vt. 425; Woodward *vs.* Gates, 9 Vt. 358; Rice's Assignees *vs.* Hulett, before cited. After forfeiture the defendant had the right to sell the property in satisfaction of his debts. Wood *vs.* Dudley, before cited; Jones Chat. Mort. s. 707; Freeman *vs.* Freeman, 17 N. J. Eq. 44. And the sale, being with the mortgagor's consent, operated as a formal foreclosure of his equitable right of redemption. Jones Chat. Mort., s. 709.

The construction of section 67, *f*, has recently been under consideration in the case of Metcalf *vs.* Barber, 187 U. S. 165. 9 Am. B. R. 36. In an opinion delivered by Mr. Chief Justice Fuller, the court said: "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment or an attachment, or otherwise that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months, the property is discharged thereupon, but not otherwise. A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditors' bill would be entirely immaterial."

Nor is the case of Wilson *vs.* Nelson, 183 U. S. 191, 46 L. Ed. 147, upon which the plaintiff relies, to the contrary. There Nelson borrowed the sum of money before the bankrupt law was enacted, and gave his promissory note therefor with an irrevocable power of attorney executed by him attached thereto authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. After the passage of the bankrupt
54 act, the owner of the note caused judgment to be entered upon the note and the warrant of attorney. Upon this judgment an execution was issued and the same was levied on Nelson's goods which were subsequently sold, and the proceeds were applied in part payment of the judgment. These proceedings were wholly without Nelson's knowledge or consent. More than five days after the levy, but before the sale of the goods, a petition in bankruptcy was filed against Nelson, and the sole question before the court was whether he had committed an act of bankruptcy within the meaning of sec. 3, cl. 3, of the bankrupt law. In considering the case, the court discussed to some extent the provisions of sec. 67 subdivision *f*. In that case, unlike the one at bar, no lien existed upon the bankrupt's property until one was created by the levy of the execution, which brought it expressly within the terms of subdivision *f*. It is there said that the bankrupt act makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact; and that the levy, which was in a proceeding begun within the four

months, would be dissolved by the adjudication in bankruptcy because its existence and enforcement would work a preference; and it was held that the debtor, by failing to vacate or discharge the preference within five days before the sale of the property on the execution, committed an act of bankruptcy.

Some or all of the amount due from the mortgagor to the defendant for rent of buildings accrued after the giving of the mortgage, and the plaintiff contends that so much thereof as did thus accrue is not covered by the mortgage, because rent is not a "contemplated loan and liability" within the meaning of that expression in the affidavit attached to the mortgage. But when the defendant is considered as standing upon a mortgage at common law, no affi-
55 davit is necessary; and regarding the sufficiency of the description of the debts, obligations, and undertakings intended to be secured thereby, the rules governing similar questions arising in connection with real estate mortgages are applicable. Under the holdings of this court in cases involving such mortgages, it is clear that the description is sufficient in this regard. McDaniels *vs.* Colvin, 16 Vt., 300; Seymour *vs.* Darrow, 31 Vt. 122; Soule *vs.* Albee, 31 Vt. 142.

Nor can we agree with the plaintiff's contention that the defendant cannot avail himself of this security to save him harmless and indemnified from paying the note for $2510.75 at the Passumpsic savings bank, signed by him as surety, because the defendant's liability thereon is not more specially described in the mortgage. In this respect, the condition of the mortgage is more specific than the one before the court in Soule *vs.* Albee. There the condition was "should also pay all sums that the petitioners or A. G. Soule should become liable to pay for Curtis Albee in consequence of signing or otherwise." This condition was held sufficient to cover an agreement whereby the mortgagee, at the mortgagor's request, verbally agreed with the mortgagor's debtor, who had been summoned as a trustee in a suit against the mortgagor, that if said debtor would pay this debt to the mortgagor, he, the mortgagee, would pay him whatever judgment should be rendered against him as trustee in that suit.

Whether the description meets the requirements of the law regarding statutory chattel mortgages, we need not inquire. The defendant cannot be deprived of his security in that behalf, until the note at the bank has been paid or he has in some other manner been fully discharged or released as surety thereon.

In considering the questions before us, we have treated all evi-
dence introduced by the plaintiff, to which defendant ex-
56 cepted, as properly in the case without regard to its legal admissibility.

The *pro forma* judgment for the defendant to recover his costs is affirmed.

I hereby certify that the foregoing is a correct copy of the opinion of the supreme court of the State of Vermont in the case of Frank

D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, *versus* Henry Fairbanks.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

57 Supreme Court of Vermont, Caledonia County.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff,
vs.
HENRY FAIRBANKS, Defendant. } No. 1358.

Assignment of Errors.

Now comes the above plaintiff and says that there are errors in the record, proceedings, decision, and final judgment of the supreme court of the State of Vermont in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment of errors:

1. The court erred in holding that the bankrupt's livery property did not pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the bankrupt's livery property did pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566.

2. The court erred in holding that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did not pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566; and in failing to hold that the money obtained from the sale of the bankrupt's livery property on June 11, 1900, did pass to the plaintiff under section 70*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, 566.

3. The court erred in holding that the plaintiff could not recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*e* of
58 the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 566; and in failing to hold that the plaintiff could recover the amount received by the defendant from the sale of the bankrupt's livery property on June 11, 1900, under section 70*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 566.

4. The court erred in holding that the defendant's chattel mortgage of April 15, 1891 was a valid lien against the bankrupt's estate under section 67*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the defendant's chattel mortgage of April 15, 1891 was not a valid lien against the

bankrupt's estate under section 67*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

5. The court erred in holding that the plaintiff was not subrogated to the rights of the Passumpsic savings bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could not enforce said rights against said mortgage of April 15, 1891 for the benefit of said bankrupt's estate under section 67*b* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564; and in failing to hold that the plaintiff was subrogated to the rights of the Passumpsic savings bank and of John Ryan, creditors of the bankrupt, as against the defendant's chattel mortgage of April 15, 1891, and could enforce said rights against said mortgage of April 15, 1891, for the benefit of said bankrupt's estate, under section 67*b* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

6. The court erred in holding that upon Moore's being adjudicated a bankrupt under the provisions of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 544, chap. 541, the defendant's rights under his chattel mortgage of April 15, 1891, stood the same as though the mortgage of March 5, 1900 had not
59 been given to, and assigned by him, or the Ryan attachment of May 7, 1900 made.

7. The court erred in holding that the property covered by the Ryan attachment of May 7, 1900 did not pass to the plaintiff under section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565, upon Moore's being adjudicated a bankrupt.

8. The court erred in holding that the Ryan attachment of May 7, 1900 being made within four months prior to the filing of the petition in bankruptcy by Moore, the lien created thereby could be preserved for the benefit of the bankrupt's estate only by an order from the bankruptcy court for such purpose under section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565.

9. The court erred in holding, that, without an order from the bankruptcy court preserving the same, the attachment of Ryan's of May 7, 1900, became absolutely null and void upon Moore's being adjudicated a bankrupt, under section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565.

10. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the property covered by the mortgage of March 5, 1900 did not pass to the plaintiff under section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

11. The court erred in holding that, upon Moore's being adjudicated a bankrupt, the mortgage of March 5, 1900 became absolutely null and void under section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

12. The court erred in holding that the defendant by virtue of his mortgage of April 15, 1891, and by taking possession of the livery property thereunder, had a lien on the said property so taken and sold paramount to the rights and title of the plaintiff under

the United States bankruptcy law of July 1, 1898, 30 Stat.
60 at L. 544, chap. 541.

13. The court erred in holding that the taking possession of the livery property of the bankrupt on May 16, 1900 by the defendant under his mortgage of April 15, 1891 brought said livery property under the cover and operation of said mortgage as of its date, for that said holding is in violation of and contrary to the provisions of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 544, chap. 541.

14. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under his chattel mortgage of April 15, 1891 was not a transfer of property rendered null and void under section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 574, upon the bankrupt's being adjudicated a bankrupt.

15. The court erred in holding that unless Moore parted with the possession of the livery property in question with a purpose on his part to hinder, delay or defraud his creditors, or any of them, his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

16. The court erred in holding that unless there was a finding that Moore parted with the possession of the livery property in question with the purpose on his part to hinder, delay or defraud his creditors, or any of them, his assent to the defendant's taking possession of said livery property would not constitute an invalid transfer thereof within the provisions of section 67*e* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 564.

17. The court erred in failing to hold that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under his chattel mortgage of April 15, 1891, was
61 a preference within the meaning of section 60*a* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 562.

18. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under his chattel mortgage of April 15, 1891 was not a preference voidable by the plaintiff under section 60*b* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 562.

19. The court erred in holding that the taking possession of the bankrupt's livery property on May 16, 1900 by the defendant under the provisions of Vermont statute, sections 2265–2268, was not the obtaining of a lien through legal proceedings within the meaning of section 67*f* of the United States bankruptcy law of July 1, 1898, 30 Stat. at L. 565.

Wherefore the said Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff, prays that the errors complained of may be reviewed in the Supreme Court of the United

States, and the judgment of the supreme court of the State of Vermont in the above entitled cause be reversed.

FRANK D. THOMPSON,
Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff,
By his attorneys, FRANK D. THOMPSON AND
DAVID E. PORTER.

STATE OF VERMONT, *Caledonia County,* } ss:

I hereby certify that the above and foregoing is a true copy of the original assignment of errors and prayer for reversal in the cause of Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore bankrupt, *vs.* Henry Fairbanks, as filed in the clerk's office of the supreme court of the State of Vermont for the county of Caledonia on the 24th day of August, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

62 Supreme Court of Vermont, Caledonia County.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff,
vs.
HENRY FAIRBANKS, Defendant. } No. 1358.

Petition for Writ of Error.

The petition of Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, respectfully shows that on the 30th day of July A. D. 1903, the supreme court of the State of Vermont rendered a final judgment in the above entitled cause in favor of said Henry Fairbanks, defendant, and against your petitioner, plaintiff, in which final judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said supreme court of the State of Vermont is the highest court of the said State of Vermont in which a decision in this suit and this matter could be had.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the supreme court of the State of Vermont for the correction of errors so complained of, and for citation and supersedeas.

FRANK D. THOMPSON,
Trustee in Bankruptcy of Herbert E. Moore, Bankrupt,
By his attorneys, FRANK D. THOMPSON AND
DAVID E. PORTER.

63 The writ of error as prayed for in the foregoing petition is hereby allowed this 20th day of August, A. D. 1903, the writ of error to operate as a supersedeas, and the bond for that purpose is fixed at the sum of five hundred dollars.

JOHN W. ROWELL,
Chief Judge of the Supreme Court.

[Endorsed:] Supreme court of Vt. Caledonia Co. Frank D. Thompson Tr. *vs.* Henry Fairbanks Petition for writ of error Filed Aug. 24, 1903 Albro F. Nichols clerk.

64 Supreme Court of the United States.

FRANK D. THOMPSON, Trustee in Bankruptcy of Herbert E. Moore, Bankrupt, Plaintiff in Error,
vs.
HENRY FAIRBANKS, Defendant in Error.

Bond.

Know all men by these presents, that we Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, as principal, and Elisha May and Fred G. Bundy as sureties, are held and firmly bound unto Henry Fairbanks in the full and just sum of five hundred dollars, to be paid to the said Henry Fairbanks, his executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of August in the year of our Lord one thousand nine hundred and three.

Whereas the above-named plaintiff in error seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the supreme court of the State of Vermont,

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

FRANK D. THOMPSON, [L. S.]
Trustee in Bankruptcy of Herbert L. Moore, Bankrupt.
ELISHA MAY. [L. S.]
FRED G. BUNDY. [L. S.]

In presence of
A. W. SMITH.

65 STATE OF VERMONT, *Caledonia County,* } *ss:*

Elisha May and Fred G. Bundy, being duly sworn, on oath depose and say: We are each of lawful age and are citizens of the State of Vermont, and know the contents of the foregoing instrument to which we have attached our names. We each for himself say we are worth the sum of five hundred dollars over and above all debts, liabilities and exemptions.

ELISHA MAY.
FRED G. BUNDY.

Subscribed and sworn to before me this 24th dat of August, A. D. 1903.

DAVID E. PORTER,
Notary Public. [L. S.]

The above bond is approved.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of the State of Vermont.

STATE OF VERMONT, *Caledonia County,* } *ss:*

I hereby certify that the above and foregoing is a true copy of the original bond in the cause of Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff in error, *vs.* Henry Fairbanks, defendant in error, as filed in the clerk's office of the supreme court of the State of Vermont for the county of Caledonia on the 26th day of August, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Vermont, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Vermont at the May term, A. D. 1903, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff, *versus* Henry Fairbanks, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their

validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said plaintiff, Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
67 Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of August, in the year of our Lord one thousand nine hundred and three.

[Seal Circuit Court, Vermont District, U. S. A.]

GEO. E. JOHNSON,
Clerk of the Circuit Court of the United States for the District of Vermont, in the Second Circuit.

Allowed by

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

[Endorsed:] Supreme Court of the United States. Frank D. Thompson, trustee in bankruptcy of Herbert E. Mo-re, bankrupt, plaintiff in error, *vs.* Henry Fairbanks, defendant in error. Writ of error. Filed Aug. 26, 1903. Albro F. Nichols, clerk.

68 STATE OF VERMONT, } ss:
Caledonia County, }

I, Albro F. Nichols, clerk of the supreme court of the State of Vermont for the county of Caledonia, do hereby certify that the foregoing writ of error was filed in the clerk's office of said supreme court on the 26th day of August, A. D. 1903, and also at the same

time and place, a copy thereof for the said defendant, Henry Fairbanks.

Witness my official signature and seal of office this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

69 UNITED STATES OF AMERICA, *ss:*

To Henry Fairbanks, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Vermont for the county of Caledonia, wherein Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Rowell, chief judge of the supreme court of the State of Vermont, this 25th day of August, in the year of our Lord one thousand nine hundred and three.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

STATE OF VERMONT, }
Caledonia County, } *ss:*

At St. Johnsbury in said county this 28th day of August, A. D. 1903, I made service of this citation and notice on the within named Henry Fairbanks by leaving at his last and usual place of abode, with one A. G. Corbett, an adult person and a resident therein of sufficient discretion to receive a true and attested copy of the original citation and notice for said Henry Fairbanks with my return hereon thereon endorsed.

Attest,

L. D. MILES,
Deputy U. S. Marshal.

Fees.

Service.....	2.00
Car fare to St. Johnsbury & return.....	2.70
	$4.70

70 Supreme Court of the State of Vermont.

OFFICE OF THE CLERK FOR CALEDONIA COUNTY.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto set my hand and affix the seal of said supreme court, at St. Johnsbury, in the county of Caledonia, this 5th day of September, A. D. 1903.

[Seal Supreme Court, State of Vermont.]

ALBRO F. NICHOLS, *Clerk.*

Costs of Suit.

Plaintiff's costs, { Co. ct. $28.21 / Sup. ct. $23.50

Defendant's costs, $19.33

Cost of transcript and serving citation, $18.06.

Endorsed on cover: File No. 19,070. Vermont supreme court. Term No. 117. Frank D. Thompson, trustee in bankruptcy of Herbert E. Moore, bankrupt, plaintiff in error, *vs.* Henry Fairbanks. Filed September 17th, 1903. File No. 19,070.